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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROY NELSON III, Successor-in-Interest to
Decedent ROY NELSON; ORNELL
STEVENSON, individually,

Plaintiffs,

vs.

CITY OF HAYWARD, et al.,

Defendants.

Case No.: 3:15-cv-07222

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER**

Date: July 29, 2019
Time: 9:30 a.m.
Ctm: C, 15th Floor

Hon. Sally Kim

Plaintiffs submit this Opposition to Defendants' frivolous and defamatory Motion for
Protective Order and Other Relief.

INTRODUCTION

On June 6, 2019, Defendants filed a Motion for Protective Order and Other Relief, wherein they sought a protective order to prevent Plaintiffs' counsel from making public comments regarding the case; cease providing confidential information to the media; permission to submit a special jury questionnaire; and to allow Defendants two additional pre-emptory challenges.

Plaintiff strongly Opposes Defendants' defamatory and frivolous Motion for Protective Order, which appears calculated to further the City of Hayward's history of concealing the true details surrounding the heinous death of Mr. Roy Nelson, for the purpose of quelling public outcry and interfering with the life-saving police reform movement in Hayward and across California.

Plaintiffs Oppose Defendants' Motion for Protective Order and Other Relief because said Motion is frivolous and clearly in violation of F.R.C.P. Rule 11. During the course of litigation Defendants waived, in writing, the confidential status of the records in questions and preserved no rights to control their future usage or dissemination. In addition, Defendants and Plaintiffs filed these same records with their Motion for Summary Judgement and Opposition, introducing these records into the public record. Further, these records are releasable under SB 1421.

In addition, continuing to maintain secrecy regarding the death of Decedent Roy Nelson poses a significant and tangible public safety hazard, as the City of Hayward has failed to discipline or retrain any of the officers involved in this horrific and preventable asphyxiation death, including a Field Training Officer. Nearly three- and one-half years has passed since Mr. Nelson's death and no measures have been taken to prevent future loss of life to persons suffering mental health crisis, something that is only permissible because the public had been shielded from the truth.

STATEMENT OF FACTS

On or about December 22, 2019, the City of Hayward Police Department issued a press release containing the following misleading and inaccurate information related to the death of Mr. Roy

1 Nelson, as reported by the Mercury News:

2 'Tuesday, police said that at 1:08 a.m. Saturday officers
3 responded to the 2500 block of Ironwood Court on a report of a
4 man police identified as Roy Nelson needing an emergency
5 mental health evaluation. After arriving, officers found the 42-
6 year-old Hayward resident, determined he needed an involuntary
7 psychiatric hold and put him in the back of a police car, police
8 said. On the way to the hospital, Nelson allegedly tried to kick
9 out the car's rear window. He was taken out of the car, placed in
10 a leg restraint and suffered a medical emergency, police said.'

11 (See [https://www.eastbaytimes.com/2015/12/22/hayward-man-
12 dies-while-in-police-custody/](https://www.eastbaytimes.com/2015/12/22/hayward-man-dies-while-in-police-custody/))

13 This misleading and knowingly erroneous statement quelled public outrage and permitted the
14 Hayward Police Department to avoid criminal prosecution, discipline, retraining and further education
15 to prevent such a horrific tragedy in the future. At the time of distribution, the City knew or should
16 have known that their public statement was belied by extensive Body Worn Camera footage showing
17 Decedent Roy Nelson being asphyxiated by Defendant Officers. Defendants further knew that
18 Decedent Roy Nelson at no point tried to kick out the back window of the patrol car, despite reporting
19 it to the media. At the time of Mr. Nelson's death, Defendant Shannon was a Field Training Officer
20 and Defendant Hall was in the field training program under Defendant Shannon's supervision.
21 Hayward Police Department never retracted or corrected their statements regarding the nature of
22 Decedent Nelson's death and it currently appears they are inclined to maintain the hedge of secrecy
23 surrounding Mr. Nelson's horrifying and preventable asphyxiation death.

24 On December 18, 2018, City of Hayward Assistant City Attorney Raymond Rollan explicitly
25 waived Defendants' right to maintain confidentiality regarding the records in question. Said agreement
26 was made via email. (See Rollan Emails, Attached to Nold Declaration as Exhibit 1) Attorney Rollan
27 is no longer employed with the City of Hayward City Attorney's Office.

28 On March 1, 2019, the court's Order on Defendants' Motion for Summary Judgment was
published into the public record, garnering attention from various news media outlets. (See Dkt. 92)

On or about May 23, 2019, the Mercury News published a report wherein Attorney
Nold was quoted discussing Decedent Roy Nelson's death. Attorney Nold does not dispute

1 the quotes reported by the Mercury News, because she is not in possession of audio or
2 video footage of her actual statement and believes the reporter in question acted in good
3 faith and accurately documented their conversation. Said news article included video
4 footage of Decedent Roy Nelson's horrific death.

5 On or about June 3, 2019, local KTVU News reported on the death of Decedent Roy
6 Nelson, wherein Attorney Pointer discussed the death of Decedent Roy Nelson. Attorney
7 Pointer does not dispute the content of the story reported by KTVU. Said news story
8 included video evidence of Decedent Roy Nelson's heinous death.
9

10 On June 4, 2019, Attorney Nold attended a City Council meeting in the City of
11 Hayward at the request of the family of Augustin Gonzales. Mr. Gonzales was killed by
12 Hayward Police Officers during a mental health episode in 2018, which is currently being
13 litigated. Attorney Nold spoke in front of the City Council to urge them to vote in favor of
14 bringing in outside investigators to investigate officer involved deaths. Attorney Nold used
15 the case of Decedent Roy Nelson as an example of how outside investigators would bring
16 transparency and criticism that would save lives.
17

18 On June 6, 2019, Defendants filed their Motion for Protective Order and Other
19 Relief. (Dkt. 112)

20 On June 10, 2019, Attorney Buelna contacted City of Hayward Assistant City
21 Attorney Brick and notified him that Defendants explicitly waived their right to maintain
22 confidentiality regarding the records in question. Attorney Buelna asked Defendants to
23 withdraw their frivolous motion and provided a detailed description of Defendants waiver
24 of confidentiality, including copies of emails from City of Hayward's former trial counsel
25 Raymond Rollan, who is no longer employed by the City of Hayward. (See Brick emails,
26 attached to Nold Declaration as Exhibit 2)
27
28

1 On June 12, 2019, Attorney Buelna; having received no response, contacted Attorney
2 Brick again via email and received an away message, indicating that Attorney Brick would
3 be out of the office until June 20, 2019. (See Exhibit 2)

4 On June 21, 2019, Attorney Brick finally responded and arrogantly indicated that the
5 waiver of the videos was ‘beside the point,’ seemingly acknowledging the frivolous nature
6 of their Motion. Nevertheless, Attorney Brick refused to withdraw his frivolous motion and
7 firmly stood behind his decision to proceed with full knowledge of his F.R.C.P. Rule 11
8 violation. (See Exhibit 2)

10 ARGUMENT

11 A. DEFENDANTS EXPLICITLY WAIVED THE CONFIDENTIAL DESIGNATIONS IN 12 WRITING

13 Defendants contend that Plaintiffs’ counsel violated the protective order in this matter by
14 disseminating confidential materials covered by the protective order.

15
16 Federal Rule of Civil Procedure Rule 11 (b) indicates that by presenting to the court a pleading,
17 written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an
18 attorney or unrepresented party certifies that to the best of the person's knowledge, information, and
19 belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any
20 improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of
21 litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a
22 nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
23 (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have
24 evidentiary support after a reasonable opportunity for further investigation or discovery; and
25 (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are
26 reasonably based on belief or a lack of information.
27

28 Here, a stipulated protective order was ordered by the court. (Dkt. 30) However, City of

1 Hayward Assistant City Attorney Raymond Rollan explicitly and specifically waived Defendants'
2 confidential designations in this matter, in writing, via email. (See Exhibit 1) Attorney Rollan is no
3 longer employed with the City of Hayward and is no longer involved in this litigation.

4 Defendants further waived their right to maintain confidentiality regarding these records when
5 they were filed along with Defendants' Motion for Summary Judgment and Plaintiffs' Opposition to
6 Defendants' Motion for Summary Judgment. Upon filing the documents with the District Court, the
7 parties made these records part of the public record.

8
9 In addition, the Body Worn Camera footage would be made publicly available under Senate
10 Bill 1421.

11 Upon notice of Defendants' Motion for Protective Order and Other Relief, Plaintiff contacted
12 Defendants' Attorney Brick. Plaintiffs assumed that Attorney Brick; who entered into the litigation
13 during the eleventh hour, was unaware of the waiver and filed Defendants' Motion in good faith.
14 Plaintiffs provided Attorney Bricks evidence of Defendants' waiver via email. Plaintiffs further
15 requested that Defendants amend or withdraw their frivolous motion. Attorney Brick refused to
16 withdraw or amend their Motion and indicated that the confidential records were 'beside the point,'
17 despite having made the records one of his points of contention. (See Exhibit 2)

18
19 Defendants possessed full knowledge that they were in violation of F.R.C.P. Rule 11, for filing
20 a document containing known inaccuracies for wrongful purposes and were notified of their frivolous
21 filing. Nevertheless, Attorney Brick refused to Amend or Withdraw his frivolous Motion for
22 Protective Order and Other Relief, thereby continuing the City of Hayward's campaign of
23 misinformation related to Decedent Roy Nelson's death.

24
25 Defendants waived their right to confidentiality regarding the records specifically and
26 explicitly; by way of dissemination into the public record; and under state law. Therefore, Plaintiffs
27 are in no way in violation of any Protective Order and Defendants' Motion should be denied.
28

B. COUNSEL DID NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT NOR ANY LOCAL RULES

Although Defendants’ curiously cite no caselaw to support their contentions whatsoever, they contend that Plaintiffs’ counsel is attempting to litigate this case in the court of public opinion and contend that Plaintiffs’ counsel Nold and Pointer violated the California Bar’s Standards of Professional Conduct Section and Northern District Local Rule 11-4.

Under Northern District Local Rule, 11-4, section (a) Duties and Responsibilities, every member of the bar of this Court and any attorney permitted to practice in this Court under Civil L.R. 11 must:

- (1) Be familiar and comply with the standards of professional conduct required of members of the State Bar of California;
- (2) Comply with the Local Rules of this Court;
- (3) Maintain respect due to courts of justice and judicial officers;
- (4) Practice with the honesty, care, and decorum required for the fair and efficient administration of justice;
- (5) Discharge his or her obligations to his or her client and the Court; and
- (6) Assist those in need of counsel when requested by the Court.

California Rules of Professional Conduct 3.6 (a), prohibits a lawyer from making statements to the media that the lawyer “knows or reasonably should know” will have “a substantial likelihood of materially prejudicing an adjudicative proceeding.

Defendants cite California Rules of Professional Conduct 3.4(g) which bars counsel from asserting personal knowledge of facts in issue except when testifying as a witness or state a personal opinion as to the guilt or innocence of an accused. This rule appears to apply only to trials.

In *U.S. v. Wilson*, the court denied the party’s request to restrain a party from speaking to the media regarding a case. 925 F.Supp.2d 410, 412 (E.D. New York 2013). The court indicated that ‘before the court may impose any sort of ‘gag order,’ it must, among other things, determine whether “other

1 available remedies would effectively mitigate the pretrial publicity.” *Id* at 412. The court outlined such
2 remedies as ‘searching voir dire’ and ‘emphatic jury instructions.’ *Id*. The silencing of attorneys raises
3 First Amendment issues and “the limitation on attorney speech should be no more than is necessary to
4 protect the integrity of the judicial system and the defendant’s rights to a fair trial.” *U.S. v. Corbin*, 620
5 F.Supp.2d 400, 411-412 (E.D. New York 2009).

6 Here, California Rules of Professional Conduct 3.4(g) is inapplicable, because it only applies to
7 trial. The trial in this matter is currently set for October 2019, but that date is uncertain due to
8 Defendants’ patently frivolous appeal in this matter.

9 Defendants provide no caselaw to support their content whatsoever. Defendants describe no
10 material prejudice worthy of quelling counsel’s First Amendment rights. Any potential prejudice can
11 easily be resolved in voir dire.

12 Defendants appear to be crediting Plaintiffs’ counsel for any and all outrage and embarrassment
13 related to Decedent Roy Nelson’s death, which Defendants previously tried to silence with their
14 campaign of misinformation. However, all media coverage of this incident included footage of the
15 subject incident which is part of the public record. The videos in the public record show clear and
16 unambiguous footage of Decedent Roy Nelson’s terrifying final moments on this earth as he was slowly
17 asphyxiated by Defendant Officers. During the video Defendant Officer Shannon can clearly be seen
18 perched on top of Decedent Roy Nelson’s back, with his foot on top of Mr. Nelson’s head. Decedent
19 Roy Nelson can he clearly heard saying ‘I can’t breathe.’ This video speaks for itself and the ownership
20 any prejudice related to the release of the publicly available videos is purely related to Decedent Roy
21 Nelson’s horrific death and is unrelated to counsel’s comments.

22 All information provided to the media was publicly available and had been previously and
23 intentionally omitted by Defendants for the purpose of concealing constitutional violations. Counsels
24 comments sought to clarify the true circumstances leading up to Decedent Roy Nelson’s death.

1 Any prejudice attributed to the media coverage is the natural response to watching a human
2 being suffocated and treated worse than an animal. Plaintiffs' counsel can hardly take credit for any
3 prejudice that arises out of viewing these horrible, publicly available videos. Defendants cannot support
4 a straight-faced claim that counsel's words caused any prejudice, as opposed to content of the videos.

5 Defendants have provided no case law to support their request. Defendants have not
6 demonstrated any material prejudice. Any purported prejudice suffered by Defendants can easily be
7 remedied by way of voir dire which would identify the off chance that an individual was impacted by
8 pretrial publicity, making a protective order unnecessary.

9
10 Plaintiffs have not violated any court or ethical rules by commenting on a case of public safety
11 and public interest previously concealed by Defendants. Defendants Motion should be denied in its
12 entirety.

13
14 **C. THE CIRCUMSTANCES SURROUNDING ROY NELSON'S DEATH ARE A MATTER**
15 **OF PUBLIC SAFETY**
16

17 The circumstances leading up to Decedent Roy Nelson's are a matter of public record and
18 impact the safety of the general public. Defendants knowingly concealed the circumstances
19 surrounding Decedent Roy Nelson's death, by omitting from their press release that Defendant
20 Officers caused Mr. Nelson's death. Defendants lead the public to believe that Decedent Roy Nelson
21 succumbed to some inexplicable medical emergency, which was belied by the available Body Worn
22 Camera footage in their possession at the time they issued their press release.

23
24 In the more than three-and-one-half since Mr. Nelson's death, the Hayward Police Department
25 has not retrained or disciplined anyone involved in this incident, not even Defendant Shannon, who
26 is/was a Field Training Officer, or Officer Hall, who was in the field training phase at the time of Roy
27 Nelson's death. The City of Hayward's conduct surrounding this preventable death demonstrates a
28 serious public safety issue for mentally ill members of the public, who are subject to being detained in

1 a WRAP device.

2 During the June 2019 Hayward City Council meeting, Attorney Nold spoke to the council at
3 the request of the family of ANOTHER mentally ill man, who was killed by Hayward Police Officers
4 in 2018, years after Decedent Roy Nelson was asphyxiated. At the City Council meeting, Attorney
5 spoke to the Council to urge them to vote in favor of requiring every officer involved death to be
6 investigated by an outside agency. Attorney Nold mentioned Mr. Nelson's death at the meeting, as an
7 example of why external investigations are necessary. It is undisputed that none of the Defendant
8 Officers were retrained or disciplined as a result of killing Decedent Roy Nelson. Attorney Nold
9 implored the Hayward City Council to vote in favor of outside investigators to prevent the Police
10 Department from squandering and concealing opportunities to save lives in the future. As a result of
11 Attorney Nold and others speaking in support of this vote, the Hayward City Council voted to
12 implement outside investigations for officer involved deaths.
13

14 These statements are protected by the First Amendment and any purported prejudice is strongly
15 outweighed by the grave public safety concerns associated with concealing this incident.
16

17
18 **D. NO ADDITIONAL PRE-EMPTORY CHALLENGES ARE WARRANTED**

19 Defendants contend they should be entitled to include questions about media exposure to the
20 case in the jury questionnaire and two extra pre-emptory challenges to offset the prejudice they
21 purport.

22 Here, there is absolutely no basis for Defendants to request additional pre-emptory challenges
23 simply because they do not enjoy the light of truth shining upon them. Defendants have failed to
24 explain how additional pre-emptory challenges would remedy their grievance. The court typically
25 inquires about jurors' prior knowledge of the case to detect individuals with prejudices or knowledge
26 which might impact their ability to fairly judge the evidence. Those jurors would be removed for
27 cause.
28

1 Defendants make no argument for how or why extra pre-emptory challenges would remedy
2 their purported grievance and appears to be requesting additional pre-emptory challenges simply to
3 penalize counsel for exercising their First Amendment rights. Defendants actions appear calculated to
4 silence counsel and unfairly stack the deck with ‘favorable’ jurors, in a case where Defendant Officers
5 have already killed a man with impunity. The only imaginable motive for asking for additional pre-
6 emptory challenges, would be to ensure that there are no persons of color seated as jury.

7
8 Plaintiffs have full faith in the court’s ability to assess and remove jurors who have been
9 prejudiced by the myriad of media reports of countless officer involved deaths in Hayward and across
10 the country. As such there is no basis for Defendants’ request and it should be denied outright along
11 with the rest of their frivolous Motion.

12 13 CONCLUSION

14 Defendants made a knowing and demonstrated waiver of the materials they are currently
15 claiming to be prejudiced by and their Motion should be denied in its entirety. Any prejudice
16 experienced by Defendants is a direct result of their own actions captured on video, which are only now
17 being released publicly due to Defendants’ waiver and prior decision to conceal the harm they caused
18 Decedent Roy Nelson. Defendants have described no material prejudice and cite no case law to support
19 their request. Defendants Motion for Protective Order and Other Relief should be denied in full with
20 strong condemnation to Defendants for their arrogant, overt and unapologetic Rule 11 violation.
21
22
23

24 Dated: June 24, 2019

The Law Offices of John L. Burris

25
26 By: /s/ Melissa C. Nold

Melissa C. Nold

Attorney for Plaintiffs
27
28